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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937
No. 38

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

Respondent.

PETITIONER'S REPLY BRIEF

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HAROLD L. SMITH,
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PETITIONER'S REPLY BRIEF

1. Respondent fails to show that his construction of the standard form of reinsurance agreement is supported by prior decisions.

The language of the standard form of reinsurance agreement involved in this case requires payment of reinsurance "upon proof of the payment" by the reinsured of the loss under the bond. Petitioner's main brief points out (pp. 11-12) that this language literally makes such proof of payment a condition precedent. Respondent makes no specific answer to this. He apparently assumes, as did the

Circuit Court of Appeals, that this language creates a condition precedent unless its literal meaning must be disregarded. Accordingly the main object of respondent's brief is to show that prior decisions require the Court to disregard the express condition precedent. No case cited by respondent requires this.

Allemannia Ins. Co. v. *Firemen's Ins. Co.*, 209 U. S. 326, is fully explained in petitioner's main brief (pp. 5-8, 15-16). Underlying respondent's emphasis upon the words "actually paid" in the *Allemannia* case (Brief, pp. 15, 16) is the conclusion that because these words were not given their literal meaning in that case the words "upon proof of the payment" should not be given their literal meaning in this case. This endeavor to invoke the *Allemannia* case as a precedent for disregarding language is patently fallacious.

Respondent's statement that the very agreement sued upon here was held in *United States* v. *Federal Surety Co.*, 72 F. (2d) 964, to be one of insurance against liability and not against loss (Brief, p. 12 n.) is incorrect. The decision in that case was merely to the effect that the plaintiff, asserting the rights of the party insured by the reinsured, could not sue the reinsurer.

Globe N. F. Ins. Co. v. *American B. & C. Co.*, 198 Iowa 1072, did not hold, as respondent states (Brief, pp. 19-20), that the recovery upon the standard form of reinsurance agreement there involved was for the benefit of general creditors. The recovery was for the benefit of the party insured by the reinsured, and the case was distinguished by the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Federal Surety Co., supra,* as involving an agreement by the reinsurers, distinct from

that contained in the standard form, to be directly liable to that party (72 F. (2d), p. 968).

None of the cases cited by respondent except *Globe N. F. Ins. Co.* v. *American B. & C. Co.* and *United States* v. *Federal Surety Co.* involved any language similar to that involved here.

The primary purpose of respondent's citations is to establish the existence of a rule governing the present case. The cases and texts cited, however, indicate nothing more than that payment by the reinsured is not a condition precedent to recovery of reinsurance unless the reinsurance agreement makes payment a condition precedent. Here the reinsurance agreement expressly makes payment a condition precedent. There is no rule which requires the Court to disregard the express condition precedent.

2. Respondent fails to show that his construction of the standard form of reinsurance agreement is supported by the language thereof.

In answer to respondent's conclusion that the words "reinsurance" and "reinsure" are "instinct with a promise * * * to indemnify * * * against liability" rather than against loss (Brief, p. 5), it is sufficient to point out that the standard form of reinsurance agreement reinsures expressly "against loss" (R. 47, lines. 3, 9) and respondent fails specifically to answer petitioner's argument (Main Brief, pp. 12-13) that an agreement to reinsure against loss indemnifies against payment.

Respondent stresses the provision (R. 47, lines 120-121) that "No action shall be brought against the Reinsurer hereunder unless brought within twelve months after

the date of the final settlement of all obligations under the bond" (Brief, pp. 23-25). This provision is equally appropriate under either construction of the agreement. Although respondent's position is that the words "final settlement" must be construed to mean "a determination of the amount due, or fixation of liability" (Brief, p. 25), the fact that they may also mean payment or some other form of discharge is shown by the authorities which he cites[1], and is apparently conceded by his statement (Brief, p. 24) that "The District Court * * * indicated that the word 'settlement' could be used in other ways * * *." Thus, the "no action" clause gives no aid to respondent's construction.

There is not, as respondent apparently assumes (Brief, p. 24), a rule that an indemnity agreement must be construed as indemnity against liability unless the "no action" clause requires payment before suit. The two cases cited by respondent on page 24 are merely examples of hundreds of cases each involving the question whether a particular insurance agreement, such as an automobile liability policy or an employers' liability policy, merely indemnifies the insured against payment.[2] The decisions in these cases go one way or the other according to the specific language of the whole agreement, and it would serve no useful purpose to consider them.

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[1]Bouvier's Law Dictionary, Baldwin's Ed. 1934:
"Settle. To adjust or ascertain; to pay."
Webster's New International Dictionary:
"Settle.
* * *
5. To adjust, as accounts; to liquidate; to balance.
6. Hence, to pay; as, to *settle* a bill. *Colloq.*"

[2]A great many of these cases are cited and classified in notes in 37 A. L. R. 637, 83 A. L. R. 677, 37 A. L. R. 644, and 48 L. R. A. (N. S.) 184.

Respondent emphasizes the present tense of the word "exists" in the provision that "no payment or other method of settlement by the Reinsured shall preclude the Reinsurer from showing that the alleged liability * * * for loss * * * exists or existed under some other bond * * *" (Brief, p. 26). The use of the verb "exists" in both present and past tenses is perfectly consistent with petitioner's construction, for when the reinsured avails itself of its express right to give notice requiring payment of the reinsurance by a certain date (R. 47, lines 74-76), the liability of the reinsurer then relates to an "existing" liability of the reinsured.

Petitioner points out (Main Brief, pp. 13-14) that the provision for equal division of any available collateral shows that the reinsurer's obligation is merely to pay one-half of the amount paid by the reinsured, for the obvious purpose is to give the parties proportionate reimbursement for their respective contributions to this amount and the equal division of the collateral would effect this purpose only if the contributions were equal. Respondent argues (Brief, pp. 27-29) that if the reinsurer's obligation is merely to pay one-half of the amount paid by the reinsured, equal division of what he calls "salvage" would unduly favor the reinsurer in the event of insolvency of the reinsured. The premise of this argument is the assumption that the "salvage" may exceed the amount paid by the insolvent reinsured. This assumption is obviously incorrect so far as the proceeds of collateral are concerned because the amount for which collateral could be enforced would necessarily be limited to the amount paid. Respondent does not show this assumption to be correct even so far as the proceeds of indemnity agreements are concerned.

There is nothing in the record to support his statement (Brief, p. 27) that indemnity agreements commonly exacted by surety companies are agreements to indemnify against liability and not against loss. The nature of the indemnity afforded by such indemnity agreements depends upon their particular language and it is pertinent here to point out that respondent has not challenged the statement in petitioner's main brief (p. 13), supported by many authorities, that an agreement to indemnify against loss, made with reference to a possible claim by a third party against the indemnitee, merely indemnifies against payment. Thus respondent's argument is based upon an unsound premise.

It is significant that nowhere in his brief does respondent deny petitioner's statement (Main Brief, pp. 13-14) that under the construction given to the standard form by the court below the provision for division of collateral would be inapt because the insolvent reinsured would have more than its fair share of the collateral.

Attempting to show that the exception to the requirement of proof of payment (which enables the reinsured to require payment by a certain date by giving notice of its intention to pay the loss on that date) would not be surplusage if his construction of the agreement were correct, respondent states (Brief, p. 17) that the purpose of this provision is to eliminate book entries. This explanation is purely speculative and unconvincing, but even if it were correct, the exception would nevertheless be surplusage under respondent's construction of the agreement because if payment by the reinsured were not a condition precedent the reinsured could always collect the reinsurance before making payment and there would be no need for the exception.

3. Respondent fails to show that the parties to the agreement sued upon did not intend to make proof of payment by the reinsured a condition precedent to recovery of reinsurance.

In reply to respondent's suggestion (Brief, pp. 21-22) that, in view of the *Allemannia* case and the *Globe* case, different language should have been employed in the standard form to express any intention that payment by the reinsured be a condition precedent, it is sufficient to point out that language most appropriate for this purpose is contained in the provision that

> "* * * the Reinsurer does hereby reinsure * * * against loss" (R. 47, lines 3-9)

and the provision that

> "The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured *upon proof of the payment of such items* by the Reinsured, * * *" (R. 47, lines 72-73).

Respondent fails in his effort to suggest more appropriate language. He suggests a provision to the effect that the reinsurer should be liable only for its *pro rata* portion of the amount actually paid (Brief, p. 22). This is the very language which was held in the *Allemannia* case to be insufficient to make payment a condition precedent.

Respectfully submitted,

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